RALPH M. BATCHELDER

V.

DEPARTMENT OF THE TREASURY

DOCKET NO.
BN07528010070ADD

OPINION AND ORDER

Appellant was demoted from his position of District Director, GS–14, step 5, to Program Analyst, GS–13, step 10, based on two charges: (1) that he failed to report a serious on-duty assault on a subordinate employee; and (2) that he altered agency policy without proper authorization. Appellant denied any knowledge that the assault occurred while the employee was on duty and also denied effecting any change in agency policy. The presiding official, in his initial decision issued on January 7, 1981, found both charges unsustained.

Thereafter, appellant filed a motion for attorney fees pursuant to 5 C.F.R. § 1201.37(a)(2). On August 13, 1981, the presiding official issued an addendum to the earlier decision and denied appellant's request for attorney fees as not warranted in the interest of justice.

Appellant petitions for review of the addendum decision reiterating the contentions he made before the presiding official. Appellant has not challenged specific findings made by the presiding official.

As the Board stated *Allen v. U.S. Postal Service*, 2 MSPB 582, 586 (1980), 5 U.S.C. § 7701(g)(1) mandates that the following requirements be satisfied before an award of attorney fees be made: (1) the appellant must be the prevailing party; (2) the award of attorney fees must be warranted in the interest of justice; and (3) the fees awarded must be reasonable. The Board also noted that the first two requirements must be met before a finding could be made on the third. *Allen, supra*, at 586. In the present case, appellant is clearly the prevailing party. Thus, we must therefore determine whether an award of attorney fees is warranted in the interest of justice.

In *Allen, supra*, at 593, the Board set forth examples of circumstances in which an award of attorney fees would be warranted in the interest of justice. Those examples include, but are not limited to, the following circumstances: where the agency action was "clearly without merit," or was "wholly unfounded;" where the employee is "substantially innocent" of the charges against him; where the agency action against the employee was initiated in "bad faith;" and where the agency "knew or should have known that it would not prevail on the merits" of its case when it proceeded against the appellant.

In regard to the first charge, appellant contends that all of the above-stated circumstances exist in the instant case. He alleges that he and a subordinate employee had informed an agency investigator of their belief that the assault on the employee concerned occurred while she was off

duty. He also alleges that he so stated in his oral reply to the charges. Appellant contends that, even in light of the employee's conflicting statement that she was assaulted during her working hours, the agency should have known that it would not have prevailed on the merits of the first charge. He contends that by continuing to press the charge the agency acted negligently and in bad faith and severely prejudiced his rights.

We find that these assertions do not establish the type of circumstances which would show that attorney fees are warranted in the interest of justice within the meaning of *Allen, supra*. Appellant merely contends that the agency should have found his statements with respect to the assaulted employee's duty status at the time of the incident more credible than that employee's. We find nothing in the record to compel such a conclusion by the agency. Further, we concur with the presiding official's determination that the circumstances of this case did not warrant further investigation into appellant's allegations as was found in *Erdman v. Department of Labor*, 6 MSPB 54 (1981); *Stout v. U.S. Postal Service*, 3 MSPB 440 (1980); and *Cicero v. U.S. Postal Service*, 4 MSPB 145 (1980). The issue before the agency was strictly one of credibility which would not necessarily have been resolved upon further investigation. *See Groves v. U.S. Postal Service*, 5 MSPB 510 (1981). Thus, appellant has not shown that the agency action was clearly without merit or that it otherwise justifies an award of attorney fees in the interest of justice under *Allen, supra*.

In relation to the second charge, appellant contends that the agency so negligently prepared its case that it knew or should have known that it would not prevail on the merits. He stated that the agency brought the second charge without sufficiently inquiring into the surrounding facts which would have indicated to the agency that its charge was wholly unfounded. This charge was based on the allegation that appellant had ordered the exclusion of female employees from overtime work unless they were accompanied by a male companion. Appellant alleges that the charge was based on statements made by two of his subordinate employees. Relying on *Kling v. Department of Justice*, 2 MSPB 620 (1980), citing to *O'Donnell v. Department of the Interior*, 2 MSPB 604 (1980), appellant contends that the charge would have been found groundless if the agency had undertaken purdent inquiries. However, appellant did not respond to the second charge in his oral reply. Thus, appellant presented the agency with no facts which would have prompted it to inquire further into the merits of the charge, and the agency relied solely on the allegations made by the two employees in sustaining the second charge. The fact that the presiding official later found that the charge was not supported by a preponderance of the evidence does not establish that it was negligently brought or was clearly without merit as appellant contends. *See Perez v. Department of the Air Force*, 4 MSPB 142 (1980). Rather, we find that the agency reasonably believed that

appellant committed the infraction as charged, particularly in view of his failure to respond to the charge in his oral reply. *Cf. Cicero, supra*, 4 MSPB at 146.

Appellant also challenges the agency's petition for review of the initial decision as frivolous and asserts that it unnecessarily prolonged the appeal to appellant's detriment and was indicative of bad faith. We find this contention by appellant totally inappropriate inasmuch as it would seek to impose a chilling effect on the agency's statutory right to petition for review of the presiding official's initial decision. Moreover, as we have previously found, the agency acted reasonably and in good faith in bringing both charges against appellant. We therefore find that, on the facts of this case, appellant has failed to establish that attorney fees are here warranted in the interest of justice.

Accordingly, the Board, having fully considered appellant's petition for review of the addendum to the initial decision and finding that it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The addendum decision shall become final five days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after the appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *November 22, 1982*